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In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL., PETITIONERS,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Nuclear Regulatory Commission reasonably found, based on the record in this case, that the possible complicating effects of an earthquake on the offsite emergency response plan for the Diablo Canyon nuclear power plant need not be considered in deciding whether the plant should be licensed to operate.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A74) is reported at 789 F.2d 26. The initial opinion of the court of appeals is reported at 751 F.2d 1287 (1984). The decision of the Nuclear Regulatory Commission (Pet. App. B1-B25) is reported at 20 N.R.C. 249.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. A1) was entered on April 25, 1986. The petition for a writ

of certiorari was filed on July 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After more than fifteen years of administrative licensing proceedings, on August 10, 1984, the Nuclear Regulatory Commission (NRC or Commission) authorized the issuance of a full-power license for the operation of the Diablo Canyon Nuclear Power Plant (Diablo Canyon). CLI-84-13, 20 N.R.C. 267 (1984). In a separate decision issued on the same day, the Commission determined that neither its emergency planning regulations nor any special circumstances of this plant required consideration of the possible complicating effects of an earthquake on emergency planning for a radiological accident at Diablo Canyon. CLI-84-12, 20 N.R.C. 249 (Pet. App. B1-B25). Petitioners challenged both decisions before the United States Court of Appeals for the District of Columbia Circuit. A panel of the court, by a divided vote, upheld the Commission's decision to issue a license for the plant (751 F.2d 1287 (1984)). The en banc court, by a divided vote, also upheld the Commission's decision (Pet. App. A1-A74).

1. The Atomic Energy Act of 1954, 42 U.S.C. (& Supp. II) 2011 *et seq.*, as amended by the Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*, provides the Nuclear Regulatory Commission with "broad regulatory authority over the development of nuclear energy" (*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526 (1978)). The NRC has established a thorough process for consideration of the public health, safety, and environmental aspects of nuclear power plant licensing, as mandated by the Atomic Energy Act and the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. II)

4321 *et seq.* Utilities wishing to construct a nuclear power plant must make detailed health, safety, and environmental submissions. The NRC staff reviews these submissions and, subsequent to that review, participates as an independent party in the licensing process. In accordance with the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 551 *et seq.*, and the Commission's regulations, 10 C.F.R. Pt. 2, adjudicatory hearings are then held on all construction permit and contested operating license applications. The hearings are conducted by three-member Atomic Safety and Licensing Boards, typically composed of two scientists and one lawyer. Appeals from their decisions are heard by a three-member Atomic Safety and Licensing Appeal Board, also composed of scientists and lawyers. The five NRC Commissioners have discretion to undertake further review. 10 C.F.R. 2.786. Finally, the courts of appeals have exclusive jurisdiction to review final orders of the NRC entered in licensing proceedings. 42 U.S.C. 2239; 28 U.S.C. 2342.

As part of its extensive regulations governing the licensing of nuclear power plants, the NRC requires that applicants for operating licenses develop plans to deal with the possibility of radiological emergencies. The NRC regulation governing emergency planning, 10 C.F.R. 50.47(a)(1) (Pet. App. C2), provides as follows:

> no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

Subsection (b) of that regulation then establishes 16 standards for onsite and offsite emergency response plans; none of these standards requires consideration of earth-

quakes (see *id.* at C3-C6).[1] In contrast to the general regulatory requirements for emergency planning, the NRC's siting, design, and construction regulatory requirements deal in specific detail with the extent to which seismicity and other natural phenomena must be considered. See, *e.g.*, 10 C.F.R. Pt. 100, App. A.

The sole issue presented by the petition arises out of the Commission's emergency planning requirements, rather than the plant siting, design, and construction requirements. That issue is whether the Commission's generally-worded emergency planning regulation requires specific consideration of the possible complicating effects of an earthquake on the emergency response plan for Diablo Canyon.

2. The background to this case is set forth in the opinions of the court of appeals (751 F.2d at 1296-1297; Pet. App. A5-A7). Briefly, in 1968 and 1970 the Atomic Energy Commission, the predecessor to the NRC, issued construction permits to respondent Pacific Gas & Electric Co. (PG&E) for Units 1 and 2 of the Diablo Canyon plant. Construction began shortly thereafter on the assumption that the nearest significant earthquake fault was 18-20 miles away. Four years later, the Hosgri Fault was discovered within three miles of the plant site. Although petitioners requested that further plant construction be halted, the Commission's appeal board, following an extensive reexamination of the plant's seismic design, approved that design in mid-1981. Later that year, the Commission issued a license to PG&E to load fuel and

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[1] Similarly NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (1980), a staff document providing guidance on implementation of the emergency planning regulations, does not require that specific attention be given to earthquakes in emergency planning.

conduct low-power testing. After various design errors were uncovered shortly thereafter, the Commission suspended PG&E's license and required PG&E to satisfy certain requirements concerning seismic and other design verification issues. After professionals expended more than 2,000,000 hours on the reanalysis and modification of the plant's design and after the earlier design deficiencies had been remedied, the Commission progressively reinstated elements of the suspended license and ultimately issued a license for full power operations on August 10, 1984.

Prior to the Diablo Canyon proceedings, the Commission had previously considered in the licensing proceeding involving the San Onofre Nuclear Power Plant in southern California the question whether offsite emergency planning measures must take into account the possibility that an earthquake might cause or occur simultaneously with an independently-caused radiological emergency. In that proceeding, the Commission interpreted its emergency planning regulation, 10 C.F.R. 50.47 (a)(1), as not requiring consideration of the effects on emergency planning of earthquakes which cause or occur during an accidental radiological release. *Southern California Edison Co. (San Onofre Nuclear Generating Stations, Units 2 and 3)*, CLI-81-33, 14 N.R.C. 1091, 1091-1092 (1981).[2] The Commission concluded that "[w]hether or not emergency planning requirements should be amended to include these considerations is a question to be addressed on a generic, as opposed to case-by-case, basis" (*ibid.*).[3]

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[2] The NRC's decision to license the San Onofre plant was upheld, without consideration of this question, in *Carstens* v. *NRC*, 742 F.2d 1546 (D.C. Cir. 1984), cert. denied, No. 84-1442 (June 3, 1985).

[3] The Commission later issued a notice of proposed rulemaking to consider whether a generic rule should be adopted (see 49 Fed. Reg. 49640 (1984); Pet. App. A17 n.4). No decision has yet been issued.

Because petitioners sought to raise the same issue in the Diablo Canyon proceeding, the Commission solicited the views of the parties as to whether the Commission should depart from its San Onofre decision. CLI-84-4, 19 N.R.C. 937 (1984).

After considering the parties' views, the Commission reaffirmed its decision in the San Onofre proceeding that the Commission's regulations do not require consideration of the possible effects of earthquakes on emergency response plans. CLI-84-12, 20 N.R.C. 249 (Pet. App. B1-B25). The principal reason for the Commission's decision was its finding that the occurrence of an earthquake severe enough to interfere with emergency planning proximate in time with a radiological release was an event of too low a probability to warrant specific consideration, in view of the, at best, marginal safety benefits that such consideration might yield (*id.* at B4-B5). The Commission also noted that the specific consideration given in this case to the disruptive effects of other, relatively frequent natural phenomena (*e.g.*, fog, severe storms, and heavy rain) implicitly demonstrated that the emergency plan has some flexibility to handle the similarly disruptive effects of earthquakes (*id.* at B5).[4]

3. The court of appeals, by a divided vote, upheld the Commission's decision (751 F.2d at 1287-1335). With

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[4] The Commission also considered (Pet. App. B6-B7) whether "special circumstances" existed at Diablo Canyon requiring consideration of this issue, even though the Commission's regulations do not (see 10 C.F.R. 2.758(b)). The Commission rejected petitioner's contention that the plant's proximity to the Hosgri Fault created a substantially greater likelihood of the simultaneous occurrence of an earthquake and a radiological release than at other plants, on the ground that petitioners' claim was contrary to the extensive seismic record developed in this case (Pet. App. B7). The Commission noted that the seismic design of the plant presented no undue risk and that, in fact, the site is not in an area of high seismicity (*ibid.*).

respect to the emergency planning issue, the court concluded that "[t]he Commission's decision was based on three well-articulated scientific conclusions, none of which warrant[s] characterization as aribtrary or capricious" (*id.* at 1307).[5] The court granted rehearing en banc on this issue, but refused to stay the Commission's decision to license Diablo Canyon as a full-power plant (760 F.2d 1320, 1321 (1985)).

The en banc court of appeals, by a divided vote, also upheld the Commission's decision (Pet. App. A1-A74). At the outset, the court concluded that the Commission had reasonably construed and had consistently applied its own regulations, and that the Commission's position was consistent with the Atomic Energy Act (*id.* at A9-A23). The court found that nothing in the emergency planning regulation itself, in the Commission's decisions in this or the San Onofre case, in an NRC staff report referred to in the regulation, or in the Atomic Energy Act was inconsistent with the Commission's position or undermined the deference normally due an agency's interpretation of its own regulations.

The court also found that the Commission's decision not to require specific consideration of earthquakes on offsite emergency planning was reasonable and fully supported

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[5] As the court of appeals explained (751 F.2d at 1307-1308 (emphasis in original; footnotes omitted)): "First, the Commission found that the probability of a radiological accident *caused* by an earthquake was extremely low. * * * Second, the Commission considered the danger than an earthquake of significant magnitude would occur contemporaneously with a radiological accident precipitated by some other cause. The Commission concluded that, because Diablo Canyon is not located in an area of high sesimicity, the probability that such a coincidence would occur is also extremely low. Finally, the Commission also noted that the emergency plan for Diablo Canyon already possesses sufficient flexibility to deal with most disruptions that would be caused by an earthquake."

by the record (Pet. App. A23-A39). The court held that, based on the record in this case, the Commission had rationally found that the probability of an earthquake-initiated radiological release was near zero and therefore was too insignificant to justify specific consideration (*id.* at A25-A26). Second, the court upheld, as supported by the evidence, the Commission's finding that the contemporaneous occurrence of an earthquake sufficient to complicate an emergency response and an unrelated, independent radiological release is "'so infrequent that * * * specific consideration is not warranted'" (*id.* at A26 (citation omitted)). In reaching this conclusion the court, like the Commission, focused on the low probability of a serious accident with offsite radiation releases and the relative infrequency of serious earthquakes in the Diablo Canyon area (*id.* at A26-A30). The court also rejected petitioners' claim that the Commission had arbitrarily excluded consideration of earthquakes while including consideration of other natural phenomena, such as fog and heavy rainfall. The NRC's decision was reasonable, the court explained, because the latter phenomena were far more likely to occur than the former (*id.* at A31-A35).[6]

Third, the court held that the Commission reasonably concluded that the emergency response plan already in place would aid in dealing with any disruptions caused by earthquakes (Pet. App. A38). The court noted that the NRC's regulations set forth 16 general standards for all emergency plans and that these standards are designed to accommodate a wide range of accidents, including those caused by earthquakes (*id.* at A37), and found that the Diablo Canyon emergency plan contained measures,

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[6] As the court of appeals explained (Pet. App. A35), fog is 24,200 times, and heavy rain 6,875 times, more likely to occur at the plant than a major earthquake.

such as back-up communications, that were as useful in the case of an earthquake as a heavy rain (*id.* at A37-A38). As the court put it, "the Commission is not required to hold a hearing to prove what common sense shows" (*id.* at A38).[7]

ARGUMENT

The court of appeals applied well-settled principles of administrative law to the facts of this case. Its decision is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The decision in this case is of limited significance. The Commission has considered this issue in connection with only two nuclear power plants, San Onofre and Diablo Canyon, and petitioners conceded in the court of appeals that this question is largely irrelevant to plants outside of California. Moreover, the court of appeals was unanimous that the Commission is not required to consider every possible complicating factor and that the Commission must engage in line-drawing. Pet. App. A11-A12 n.2; *id.* at A60 (Wald, J., dissenting) ("the only legitimate issue in this case is whether the Commission's line-drawing was rational"). The issue in this case turns on the Commission's fact-bound conclusion that the potentially complicating effects of an earthquake at the Diablo Canyon facility are too remote to warrant specific consideration in the context of emergency planning, in light of the

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[7] The dissent stated that (1) the Commission's interpretation of its emergency planning regulations was inconsistent with the fundamental purposes of those regulations (*i.e.*, to assume that accidents may occur and to plan for such eventualities); and (2) that the Commission's refusal to consider the potential complicating effects of earthquakes on the Diablo Canyon emergency response plan was arbitrary and capricious (Pet. App. A43-A74).

negligible safety benefits. The NRC drew a line between natural hazards that were sufficiently likely to occur to warrant express consideration and hazards so improbable that specific planning would not be of substantial marginal benefit. After closely examining the record, the panel and the en banc court concluded that the NRC's decision was rational and consistent with statutory requirements. The fact that petitioners would prefer to draw the line elsewhere provides no basis for review by this Court.

This Court made clear in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978), that Congress intended that nuclear power plants could be licensed upon satisfaction of NRC requirements and that the courts are to play only a limited role in reviewing NRC licensing decisions. In this case the Commission has conducted a comprehensive adjudicatory and technical review of the Diablo Canyon operating license application. As one small part of that review, the NRC has reasonably interpreted its emergency planning regulations as not requiring separate consideration of one specific, highly improbable accident scenario in light of the fact, unchallenged by petitioners, that the plant itself has been designed to withstand earthquakes and that the emergency plans are already designed to be adaptable to various emergency conditions. The court of appeals correctly concluded that this determination, which is clearly within the NRC's technical expertise (see *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983)), should be accorded deference and upheld.

2. Petitioners' primary claim (Pet. 12-16) is that the Commission's interpretation of its emergency planning regulations nullifies the purpose of those regulations. Petitioners argue that, despite the extremely low probability that an earthquake will complicate an emergency

response to a radiological release, this possibility must nevertheless be specifically considered in emergency planning, because the purpose of emergency planning is to provide comprehensive protection from a radiological accident, no matter how unlikely the possible circumstances associated with that accident might be. That argument lacks merit.

This question hinges on the proper construction of the NRC's regulations, and it is well settled that an agency's interpretation of its own regulations is entitled to particular deference (see, *e.g.*, *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 12; *United States* v. *Larinoff*, 431 U.S. 864, 872 (1977)). When an agency's construction of its own regulations is at issue, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation" (*Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945)). That standard is amply satisfied here. As the court of appeals explained (Pet. App. A11), nothing in the text of the NRC's emergency planning regulation supports petitioner's claim. By contrast, the NRC's regulations go into great detail about the extent to which seismic considerations must be taken into account in plant siting, design, and construction. 10 C.F.R. Pt. 100, App. A. The regulations thus treat siting, design and construction differently in this respect from emergency planning. Contrary to petitioner's claims, this difference does not denigrate the importance of emergency planning. Rather, it recognizes that a plant, unlike an emergency response plan, cannot easily be modified once it is in operation. It also recognizes that there is a valid distinction between planning emergency responses for a range of hypothetical accidents with unpredictable details and preventing specific accidents, to the maximum extent reasonably possible, by applying recognized scientific and

engineering disciplines to plant siting, design, and construction.[8]

Moreover, the Commission's decision that emergency response plans need not expressly address highly

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[8] The NRC's statements accompanying the issuance of the emergency planning regulation also do not support petitioner's argument. At that time the Commission stated:

> The Commission's final rules are based on the significance of *adequate* emergency planning and preparedness to ensure *adequate* protection of the public health and safety * * *. As the Commission reacted to the accident at Three Mile Island, it became clear that the protection provided by siting and engineered design features must be *bolstered* by the ability to take protective measures during the course of an accident.

45 Fed. Reg. 55403 (1980) (emphasis added). The Commission's decision is certainly not inconsistent with this purpose of the emergency planning rules.

Petitioners cite the statement that "[t]he Commission recognizes that this proposal, to view emergency planning as equivalent to, rather than as secondary to, siting and design in public protection, departs from its prior regulatory approach to emergency planning" (44 Fed. Reg. 75169 (1979)) in support of their view that emergency planning must be accompanied by the same considerations as design and siting of the plant. To the contrary, however, the Commission recognized that emergency plans should not take into account every conceivable emergency situation:

> Emergency plans should be directed toward mitigating the consequences of emergencies and should provide reasonable assurance that appropriate measures can and will be taken to protect health and safety * * *. Although it is not practicable to develop a completely detailed plan encompassing every conceivable type of emergency situation, advance planning can create a high order of preparedness * * *.

44 Fed. Reg. 54308 (1979). The Commission's emphasis has been that emergency plans be reasonably adequate and flexible, not that they deal precisely with specific accident scenarios. Design and construction of the plant, on the other hand, admit to, and the Commission requires, far greater engineering precision and specificity. See page 11, *supra*.

improbable accident sequences allows for the efficient conduct of planning reviews. If the Commission's probability-based "rule of reason" were disallowed, the evaluation of emergency plans could become an open-ended exercise in creative speculation, rather than the practical planning process that the Commission's regulations intended. Thus, petitioners cannot effectively eliminate probability considerations from emergency planning by an over-simplified reference to the "fundamental principles" of planning. The Commission's reliance on probabilities is a reasonable approach to determining whether its emergency planning regulations required consideration of possible earthquake effects.[9]

Most of petitioners' remaining claims (Pet. 16-17) basically repeat the arguments rejected by the panel and en banc court of appeals. These claims involve narrow disputes concerning the construction of the NRC's staff manual, the NRC's prior decisions, and the NRC staff's recommendations. The court of appeals correctly rejected

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[9] It should be recognized that Diablo Canyon has an emergency plan that meets the Commission's regulatory standards, including the 16 general planning standards which all emergency response plans must meet. 10 C.F.R. 50.47(b) (Pet. App. C3-C6). These general standards are designed to be flexible and to function over a wide range of theoretical accident scenarios. This flexibility has been enhanced in the Diablo Canyon proceeding by particularized consideration of the effects that relatively frequent natural phenomena might have on an emergency response. Petitioners do not claim that these requirements are in themselves insufficient; their claim goes instead to the issue of what specific complicating factors the Commission needs to consider in order to find "reasonable" assurance that "adequate" protective measures can and will be taken in the event of an emergency. 10 C.F.R. 50.47(a) (Pet. App. C2). The NRC has not abused its discretion or nullified its regulations by drawing a line that allows emergency plans to be confined to specific consideration of only relatively frequently occurring natural phenomena.

petitioners' arguments on the basis of the record in this case (Pet. App. A12-A21, A31-A35), and those fact-bound claims do not warrant review by this Court.

3. Petitioners criticize (Pet. 21-22) the court of appeals' decision on the ground that the court allegedly failed to require the NRC to provide a reasoned basis for concluding that specific consideration of the complicating effects of earthquakes on the Diablo Canyon emergency response plan was unnecessary. Far from abdicating its responsibility to take a hard look at the NRC's decision, however, the en banc court of appeals in a comprehensive opinion, on which we rely, explained in detail why the Commission's interpretation of its regulations and the Atomic Energy Act was entitled to deference, was supported by the evidence of record, and was eminently rational. As that court found, the Commission's determination "is supported by the record, not merely adequately but, we think, conclusively" (Pet. App. A26). In so ruling, the en banc court correctly followed this Court's teaching that courts must be especially deferential when reviewing technical determinations by the NRC that are both at the frontiers of science and within the Commission's area of special expertise. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. at 103.

Petitioners plainly err in contending (Pet. 22-23) that the court of appeals upheld the Commission's decision on the basis of an improper post hoc rationalization that the simultaneous occurrence of an earthquake and an independently caused radiological accident is mathematically insignificant. All that the court did was to offer simple arithmetical calculations based on record evidence to show that the qualitative factual finding made by the

Commission was correct (Pet. App. A29-A30).[10] These computations were simply a means of illustrating the correctness of the Commission's finding that "[t]he possibility that an earthquake would disrupt a response to a radiological emergency is so extremely low as to be, for any practical purpose, nonexistent" (Pet. App. A30 (footnote omitted)). The court's use of such illustrations drawn from the administrative record is perfectly proper, violates no standards of judicial review of agency decision-making, creates no split in the circuits, and provides no ground for review by this Court. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-767 n.6 (1969) ("*Chenery* does not require that we convert judicial review of agency action into a ping-pong game" in which "meaningless * * * remand[s]" are required as part of an "idle and useless formality").

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[10] The panel, in considering the same question, observed (751 F.2d at 1308 n.115):

> Because each probability [that of a radiological release and that of an earthquake large enough to disrupt emergency planning] is considered very small, the product is much smaller still, yielding a joint probability that falls well below the threshold of scientific and legal significance. * * * The only conceivable grounds on which the Commission can be faulted is that it failed to perform the final step in its mathematical analysis. Because the result is self-evident, however, we see no reason to delay operations at Diablo Canyon and demand that the Commission formally perform an elementary exercise in multiplication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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